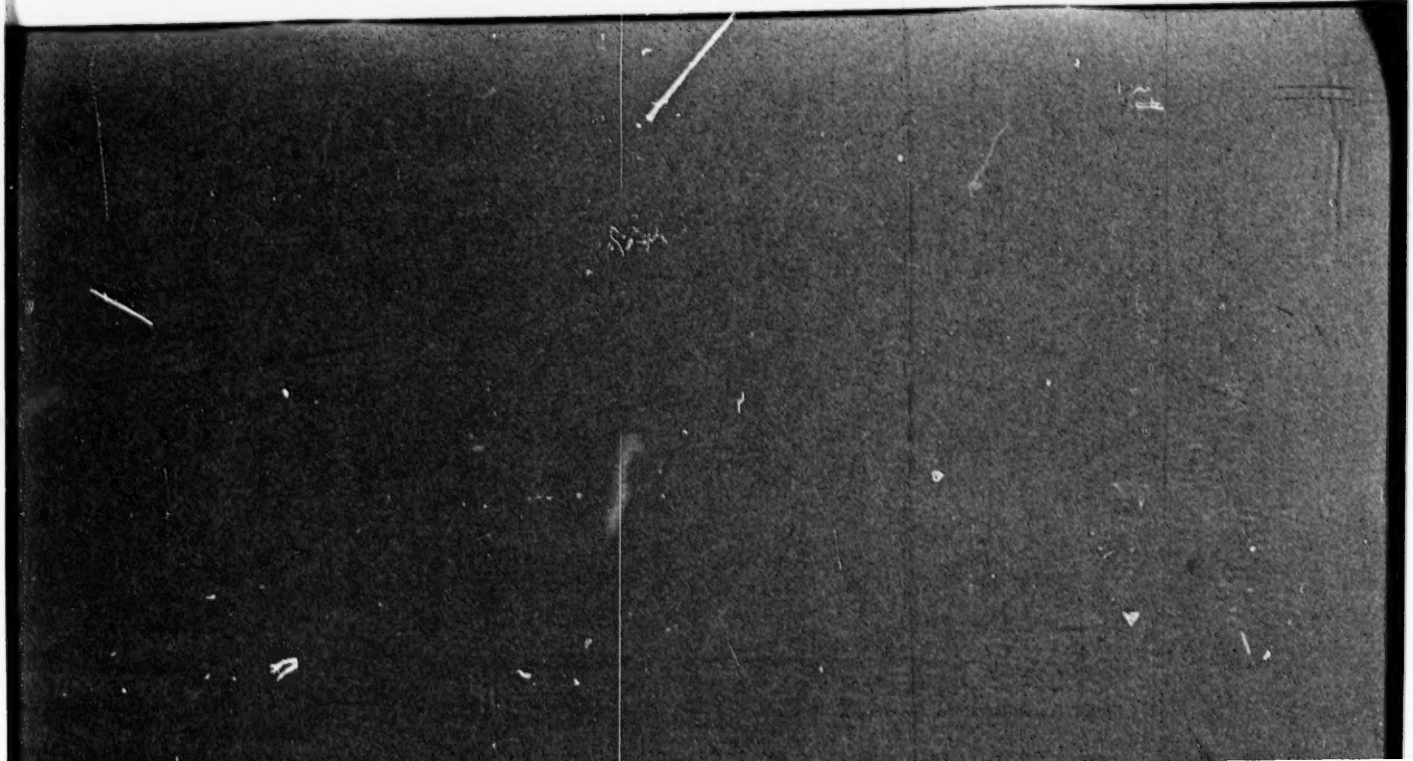

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-580

BENNIE STONE GOODEN, ET AL.,
Petitioners,

vs.

MISSISSIPPI STATE UNIVERSITY, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the lower courts are adequately presented in the petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1974. The petition for a rehearing or in the alternative a rehearing *en banc* was denied on October 16, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

Whether the Court of Appeals was correct in vacating the permanent injunction issued by the district court which was based solely upon a record consisting of little more than oral argument of counsel, and completely void of any supportive proof.

II.

Whether an actual live controversy existed at the time of the hearing in the district court as mandated by Article III, §2, of the Constitution of the United States; *Golden* v. *Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969) and *Steffel* v. *Thompson*, ... U.S. ....., 94 S.Ct. ....., 39 L.Ed.2d 505 (1974) or was this action rendered moot over a year before.

III.

Whether the petitioners are entitled to an award of attorney's fees when neither the district court nor the Court of Appeals found any basis in the record for granting them under 20 U.S.C.A. §1617.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This cause involves Article III, Section 2, Constitution of the United States and 20 U.S.C.A. §1617:

"§1617 Attorneys Fees.

Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with

any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of Title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, *the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow* the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (Emphasis added)"

STATEMENT OF THE CASE

Early in 1972, the defendant, Mississippi State University, granted the Academy Athletic Conference of the Mississippi Private School Association (AAC) permission to use the University's gymnasium and related athletic facilities for holding an overall conference championship in basketball. The games were scheduled to be held the week of February 21-26, 1972. Mississippi State also authorized the AAC to use the University's gymnasium and other campus facilities for conducting its all-star games in basketball. These particular games were scheduled during the second week in March, 1972.

These athletic contests were never held on the campus of Mississippi State University.

This class action was filed February 14, 1972, on behalf of certain black students in attendance at the Clarksdale Municipal Separate School District, Clarksdale, Mississippi. They sued on behalf of "students throughout the State of Mississippi who are aggrieved by the policies and practices of the defendants complained of herein." The gravamen of the Complaint consisted of allegations that the proposed use of the facilities at Mississippi State for the

purpose of the AAC basketball tournaments would be of such benefit to the Conference as to deny those black students their right to an integrated education.

The plaintiffs sought an immediate hearing for a preliminary injunction or, in the alternative, a temporary restraining order. The necessity of such relief was negated by the recision of the AAC's request to utilize the facilities of Mississippi State University for the functions complained of.

> "The Academy Activities Commission of the Mississippi Private School Association wishes to withdraw *any and all* of its requests to hold functions at Mississippi State University as of this date, February 14, 1972." [App., P. Brief, p. 11]

It was not until March 22, 1973, over a year, when the plaintiffs' Motion for a Permanent Injunction was heard by the district court. The proceeding is accurately described in the appellate court's opinion:

> ". . . A hearing consisting solely of statements and arguments of counsel, was held in February [March] of the following year. The district judge made no findings of fact, but issued . . . [its] . . . injunction on April 4, 1972." 499 F.2d 441, 442.

Here, as in their argument before the Court of Appeals, the defendants state:

> ". . . the issuance of the injunction was an imprudent exercise of the court's equitable power because (1) none of the circumstances present in *Gilmore* was shown to be present in this case, (2) no threat of similar requests or approvals in the future was shown, and (3) at the time of the issuance the cause was moot." 499 F.2d 441, 442.

Given this obvious lack of factual support for injunctive relief, neither the district court nor the Court of Appeals found no rationale to award attorney's fees pursuant to 20 U.S.C.A. §1617. Indeed, the district court made no discretionary finding as mandated by the statute, and the Circuit Court affirmed, 499 F.2d 441, 444.

ARGUMENT

This case was held in abeyance by the United States Court of Appeals for the Fifth Circuit pending decisions of this Court in *Gilmore* v. *City of Montgomery*, ... U.S. ....., 94 S.Ct. 2416, 41 L.Ed.2d 304 (1974) and *Beadley* v. *Richmond School Board*, ... U.S. ....., 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). Given the subsequent pronouncements, the appellate court succinctly stated the issue now before this Court:

> "Even with the guidance provided, the single issue in this cause continues to be whether a controversy would support injunctive relief remained after the withdrawal of the single private school request for the use of public facilities." 499 F.2d 441, 443.

I.

The Court of Appeals Was Correct in Vacating the Permanent Injunction Granted by the District Court Because the Record Is Completely Void of Any Proof That Gilmore Circumstances Existed at Mississippi State University.

At the very least, the existence of an actual case or controversy was removed by the withdrawal of the request to use the facilities at Mississippi State University

by the initiating party, the Academy Activities Commission, of the Mississippi Private School Association. This is true, for as stated (and therefore admitted) in the petition, page 3, ". . . *all* private . . . schools with athletic programs . . . are members of the Academy Athletic Conference. . . ." All that remained after AAC withdrawal on February 14, 1972, was the ghost-like possibility that something might have happened in the past and/or might happen in the future. This is insufficient grounds for a permanent injunction. U. S. Const., Art. III, §2; *O'Shea* v. *Littleton*, ... U.S. ....., 94 S.Ct. 669, 38 L.Ed.2d 674, 682 (1974):

> "Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. Massachusetts v. Mellon, 262 U.S. 447, 488, 67 L.Ed. 1078, 43 S.Ct. 597 (1923). The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' Golden v. Zwickler, 394 U.S. 103, 109-110, 22 L.Ed.2d 113, 89 S.Ct. 956 (1969); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 85 L.Ed. 826, 61 S.Ct. 510 (1941); United Public Workers v. Mitchell, 330 U.S. 75, 89, 91 L.Ed. 754, 67 S.Ct. 556 (1947)."

This cause alleges the existence of certain constitutional facts established by impermissible acts of the defendants. For the petitioners in *Gooden* to be successful, it is necessary for them to prove that their allegations place this case within the ambit of *Gilmore*. This they cannot do. Neither in the district court record nor the circuit court opinion is there any finding whatever that particular circumstances did in fact exist, that the defen-

dants had committed certain acts, and that as a result, related unconstitutional policies were present:

> "Instead of prompt and orderly compliance with the District Court's mandate, however, the City of Montgomery engaged in an elaborate subterfuge to anticipate and circumvent the Court's order." 41 L.Ed.2d 304, 315, 316.
>
> • • •
>
> "Particularly important is the fact that the city's policies operated directly to contravene an outstanding school desegregation order." 41 L.Ed.2d 304, 316.
>
> • • •
>
> "Certainly, the city's officials were aware of this order and were responsible for seeing that no actions on their part would significantly impede the progress of school desegregation in the city." 41 L.Ed.2d 304, 316.
>
> • • •
>
> "Here, the city's actions significantly enhanced the attractiveness of segregated private schools, formed in reaction against the federal court school order, by enabling them to offer complete athletic programs." 41 L.Ed.2d 304, 317.
>
> • • •

and,

> "We are persuaded . . . that this assistance significantly tended to undermine the federal court order mandating the establishment and maintenance of a unitary school system in Montgomery." 41 L.Ed.2d 304, 317.
>
> • • •

More importantly,

> *"The essential finding justifying further relief would be a showing of a direct impairment of an outstanding school desegregation order."* 41 L.Ed.2d 304, 318. (Emphasis added)

The record in this case contains no evidence that any circumstances remotely similar to *Gilmore* has occurred at an institution of higher learning of Mississippi. Neither Mississippi State University nor the Board of Trustees of State Institutions of Higher Learning was under any judgment of the kind against the City of Montgomery. At the time of the filing of the complaint, the district court opinion in *Gilmore* was unpublished and the appellate decision had not been rendered. 499 F.2d 441, 443, fn. 4.

The one instance which might have, did not occur. On that foundation, the defendants note the lack of injury to the complaining party and, of course, any significant adverse effect upon the desegregation of public schools in Mississippi, which was the point of major concern in *Gilmore*. At 499 F.2d 441, 443, fn. 4, the Court of Appeals found:

> "Only Mississippi State University was shown to have acted, yet the injunction controlled the actions of the Board of Trustees at all eight collegiate institutions under their control which were located throughout the state. Its single action was a year prior to our decision in Gilmore. The district court never entered any order on the maintainability of this action as a class suit. Fed.R.Civ.P. 23(c). The effect on Clarksdale high school students of the proposed but aborted Starkville basketball tournament was not demonstrated except by the unarticulated inferences which

might be drawn from facts established in the record from Norwood v. Harrison, supra. The asserted affirmative duty of the Board to adopt a policy forbidding the grant of exclusive use of facilities to private school students is devoid of support in the record. See n. 10 to Gilmore, supra, ... U.S. at ....., 94 S.Ct. 2416."

Judicial notice of *Norwood* v. *Harrison*, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973) in this case is inappropriate and inapplicable. First, it was an entirely unrelated cause composed of different defendants and different subject matter. Secondly, *Norwood*, supra, was submitted to the Court on compiled record, consisting to the largest extent of depositions. Lastly, the utilization of such information against non-parties not represented was not contemplated by and was in direct conflict with Rule 32(a), F.R.Civ.P.

Judicial notice is not judicial knowledge. *Shapleigh* v. *Mier*, 299 U.S. 468, 475, 57 S.Ct. 261, 81 L.Ed. 355, 359 (1937).

II.

There Has Been No Injury to the Complainants; This Action, Because of the Withdrawal of the Request by the AAC, Is Moot.

To recapitulate, the facilities of Mississippi State University were never utilized by the Academy Athletic Conference. The issuance of a preliminary injunction in this cause was unnecessary since the request of the AAC was withdrawn. The Court of Appeals was correct: The motion for a permanent injunction in the district court was academic since the record clearly shows no further overt acts had occurred.

The courts below did not make findings as to the existence of any "forbidden acts" prior or subsequent to the proposed (later rescinded) tournaments at the institution. Thus, on the record now before this Court, no basis exists to determine whether any allegation presented is prohibited by the Constitution. *Meltzer* v. *Board of Public Instruction*, 480 F.2d 552 (5 Cir. 1973).

Without specific, live and continuing injury to a federally protected right, this cause lacks the case or controversy necessary to invoke jurisdiction. Bare allegations are insufficient. In *Golden* v. *Zwickler*, 394 U.S. 103, 107, 89 S.Ct. 956, 22 L.Ed.2d 113, 117 (1969), this Court held the district court in error and reversed, finding that a hearing based solely upon oral arguments of counsel was not foundation for a declaratory judgment.

> "[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field. United Public Workers of America v. Mitchell, 330 U.S. 75, 89, 91 L.Ed. 754, 766, 67 S.Ct. 556 (1947). The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. *Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.*" Maryland Casualty Co. v. Pacific Coal & Oil Co.,

312 U.S. 270, 273, 85 L.Ed. 826, 828, 61 S.Ct. 510 (1941). (Emphasis added)

See also *Steffel* v. *Thompson*, ... U.S. ....., 94 S.Ct. ....., 39 L.Ed.2d 505, 515 (1974).

The allegations of the petition focus upon speculative injury that might have resulted from an event which never occurred. This argument has no weight. Again, "[a]bstract injury is not enough." *O'Shea* v. *Littleton*, ... U.S. ....., 94 S.Ct. 669, 38 L.Ed.2d 674, 682 (1974); *Alabama* v. *Woody*, 473 F.2d 10, 13, 14 (5 Cir. 1973). With the presence of uncontroverted fact that with the passage of time no similar incident had arisen, this case, on its facts, is clearly distinguishable from *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969) and *Super Tire Engineering Co.* v. *McCorkle*, ... U.S. ....., 94 S.Ct. ....., 40 L.Ed.2d 1 (1974), for there is no indication on the record whatever of a "likelihood of reoccurrence." As pointed out earlier, all Mississippi private schools belong to the AAC. There is no other party to reactivate the controversy, if any. As such, there is simply inadequate foundation for a justiciable controversy and the resulting relief. With the withdrawal of its application, the AAC brought the brief episode to a close; no *Gilmore* violation exists and no constitutional question persists.

> "No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law." *Norwood* v. *Harrison*, 413 U.S. 455, 471, 93 S.Ct. 2804, 37 L.Ed.2d 723, 735 (1973).

Of necessity, it well bears repeating that the single one-shot affair (permission) which precipitated this litigation took place at only one of the eight public institutions of higher learning in Mississippi. There were only two

parties involved—the AAC and Mississippi State University. *Gooden*, 449 F.2d 441, 443, fn. 4. The petitioners, then, cannot satisfy this Court that the decision below was incorrect and that permanent injunctive relief is needed.

> "[T]he moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, *something more than* the mere possibility which serves to keep the case alive." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633, 97 L.Ed. 1303, 73 S.Ct. 894 (1953). (Emphasis added)

Petitioners could not prove and did not prove the existence of a live and continuing controversy at the time of the injunctive hearing in the district court March 22, 1973. That was the proper moment for inquiry as to whether an actual controversy existed. *Golden* v. *Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113, 117 (1969). The question then arises as to whether the case became moot before it was finally adjudicated by the district court. The appellate court from which this petition has arisen has spoken to that question. Relying upon a landmark opinion of this Court in *New Left Education Project* v. *Board of Regents*, 472 F.2d 218, 220 (1973), the Fifth Circuit held:

> "If a case becomes moot before a final adjudication, we must vacate the judgment and direct that the case be dismissed. The District Court has no power to decide moot cases. Art. III, Const.; and Muskrat v. United States, 1910, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246."

Or, as this Court stated in *North Carolina* v. *Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971):

> "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."

III.

The Decisions Below Do Not Contain the Necessary Finding for Attorney's Fees under 20 U.S.C.A. §1617; Therefore, No Basis for the Award Exists.

The petitioners concede, as they must, that the very language of 20 U.S.C.A. §1617 is discretionary in nature, providing that the district court *may*, upon certain findings on noncompliance with provisions of that statute, award reasonable attorney's fees. Granting of such fees then is by no means automatic with the filing of a lawsuit, and here the cause falls short of any foundation whatever of allowing this compensation. First, the district court made no determination; it simply stated, "Plaintiffs' motion for attorney's fees is hereby denied." *Gooden*, 499 F.2d 441, 444, fn. 6. Secondly, the Court of Appeals affirmed, 499 F.2d 441, 444.

> "Assuming, again without deciding, that Section 718 may be applicable in a moot case, no finding that these proceedings were necessary to bring about compliance with statutory or constitutional rights was made or could be supported by this record. Without such a finding, Section 718 affords no basis for a fee award. The cross-appeal is without merit."

A careful chronology of *Gooden* with *Gilmore* clearly indicates that the case falls outside the ambit of §1617. The district court opinion of *Gilmore*, 337 F.Supp. 22 (M.D. Ala., 1972) was decided less than a month before this action was filed. This opinion of mere persuasive authority

had not been reported when this incident came swiftly to a close February 14, 1972. The Circuit Court opinion, 473 F.2d 832 (5 Cir. 1973), was rendered February 9, 1973, almost one calendar year *after* the withdrawal of the request by the Academy Athletic Conference.

More importantly, though, is this action was moot before the effective date of §1617, July 1, 1972. The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. *Steffel* v. *Thompson*, ... U.S. ....., 94 S.Ct. ....., 39 L.Ed.2d 505, 515 (1973); *Roe* v. *Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *S.E.C.* v. *Medical Comm. for Human Rights*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950).

This ephemeral episode ceased the day it was filed. Surely the facts herein place this particular case within the *Northcross* v. *Memphis City Schools*, 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48, 51 (1973) exception where ". . . special circumstances would render an award unjust."

CONCLUSION

The injunctive relief granted by the district court went beyond jurisdictional grounds since a hypothetical threat based upon speculative facts is not foundation to support such an action. The argument of petitioners for attorney's fees presupposes the existence of certain facts and is predicated upon nonexistent ones. For these rea-

sons, the petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

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